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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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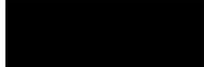


Office: NEBRASKA SERVICE CENTER

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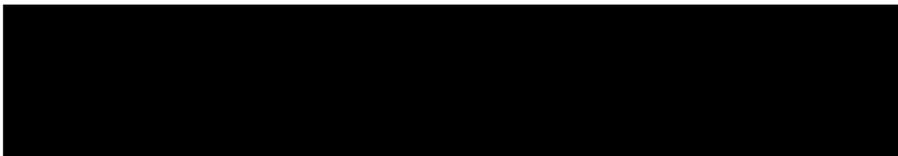
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

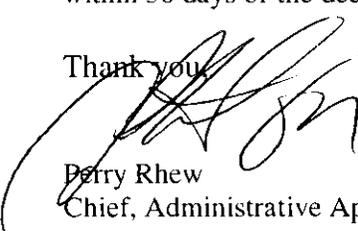


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese food cook under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

On appeal, the petitioner, through current counsel, maintains that the marriage bar does not apply.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

¹Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date, the day the [ETA Form 9089] was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

²We note that the Immigrant Petition for Alien Worker (Form I-140) would not be approvable based on the current record because, at a minimum, the beneficiary's claim of prior experience on Part B of the ETA 750 is inconsistent and raises doubts as to his claimed two years of experience as a Chinese Food Cook as required by the terms of ETA Form 9089 (part H). First, we note that the record contains a letter dated January 10, 2007, on the letterhead of [REDACTED] signed by [REDACTED] as "President, in which it is claimed that the beneficiary worked there as a Chinese food cook from May 2001 to October 2004." Public records indicate that this firm was dissolved on June 28, 2006. See [http://appext9.dos.state.ny.us/corp_public/CORPSEARCHENTITY_INFORMATION?p...\(accessed December 13, 2010\)](http://appext9.dos.state.ny.us/corp_public/CORPSEARCHENTITY_INFORMATION?p...(accessed December 13, 2010)). Second, full-time employment is not specified in the letter. Third, none of the biographic questionnaires (Form G-325A, signed on October 31, 2003, August 26, 2004, and May 3, 2005 filed with the beneficiary's I-484 applications or other petitions) contained in the record and signed by the beneficiary, specifically mentions this employer in the space allotted for employment for the past five years. Further, the beneficiary indicated in the interview held on July 25, 2005, in

As reflected in the record, the petitioner filed the Form I-140 on March 5, 2007. The Service Center director denied it on July 5, 2007, determining that the marriage bar provisions under section 204(c) of the Act, 8 U.S.C. § 1154(c), applied to this case:

Notwithstanding the provisions of subsection (b)³ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Specifically, the director determined that the Form I-140 petition was ineligible for approval because of a previously filed Petition for Alien Relative (Form I-130), which was denied on July 26, 2005, and which sought to sponsor the beneficiary as the husband of a U.S. citizen, [REDACTED]. The Service Center director noted that the district director's denial of the Form I-130 found that the petitioner's marriage was created "strictly to procure Immigration benefits for your spouse and for no other reason. . ." Therefore, the Service Center director concluded that the marriage bar provisions under section 204(c) of the Act applied to prohibit approval of the subsequently filed Form I-140.

connection with the Form I-130 petition filed on his behalf by [REDACTED] that he used to be a "waiter," and not a cook, but he stopped doing that in October 2004. Additionally, part K of the ETA Form 9089, signed by the beneficiary on January 15, 2007, claims employment as a Chinese specialty cook at the [REDACTED], which is also mentioned on his G-325A(s). However, a letter from this entity, with a letterhead appearing as [REDACTED]" dated March 10, 2001, although describing him as a chief cook, describes his duties as primarily kitchen management, not cooking. As these statements are not consistent, the credibility of the beneficiary's claimed employment, as the record stands, is not considered reliable. This petition would not be eligible for approval, at a minimum, on this basis even if the fraudulent marriage bar did not apply. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

The record indicates that the beneficiary, a native of the People's Republic of China, married [REDACTED] on August 25, 2004, in New York, New York. [REDACTED] signed the Form I-130 one day later, on August 26, 2004, which was filed with the Service on September 15, 2004. Both stated that they had prior marriages. [REDACTED] divorce judgment from [REDACTED] was final in New York on April 22, 1999 as indicated in the record. On the I-130, the beneficiary states that his marriage to [REDACTED] ended on June 16, 2004 in the PRC. As proof of this divorce, the beneficiary provided a Notarial Certificate stating that the beneficiary and [REDACTED] registered a divorce [REDACTED] on June 16, 2004.⁴ We note that the English translation of the Chinese notarial certificate does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As noted above (footnote 2 herein), the record contains three different G-325A biographic forms submitted in connection with various applications. While it is noted that the G-325A form signed by the beneficiary on August 26, 2004 (one day after his marriage to [REDACTED], lists both his marriage to [REDACTED] as his current wife and [REDACTED] as his former wife, the G-325A signed by the beneficiary on May 3, 2005,⁵ two and a half months prior to his interview on the I-130 pertinent to his marriage to [REDACTED] omits [REDACTED] completely and represents [REDACTED] as his current wife, with no mention of divorce. Other evidence in the record includes a copy of a 2004 Form 1040, U.S. Individual Income Tax Return jointly filed by [REDACTED] and the beneficiary as married persons and claiming [REDACTED] daughter (not the beneficiary's child) as a dependent. The refund payable to [REDACTED] and the beneficiary that year was \$97. A copy of a Wage and Tax Statement (W-2) accompanying the return indicates that the beneficiary worked for [REDACTED] and received \$5,000 in wages. No indication of wages paid by [REDACTED] to the beneficiary in 2004 was included, despite the letter issued attesting to his employment in 2004. It is noted that public records indicate that the beneficiary is the chairman or chief executive officer of [REDACTED]. Copies of the beneficiary's individual income tax returns for 2002 and 2003 were submitted. He filed as a single person in both years. It is unclear if the beneficiary has ever filed as a married person with [REDACTED]. It is noted that the record contains no other evidence that [REDACTED]

⁴ It is unclear if this certificate represents a final divorce certificate. Article 31 of the divorce and marriage law in the PRC permits divorce if husband and wife both desire it. "Both parties shall apply to the marriage registration office for divorce. The marriage registration office, after clearly establishing that divorce is desired by both parties and that appropriate arrangements have been made for the care of any children and the disposition of property, shall issue the divorce certificate." See http://divorcemediation.us/divorce_and_marriage%20in_china.htm. . .(accessed December 13, 2010.)

⁵It appears that this G-325A may have been filed in connection with an I-485 filed on May 23, 2005.

⁶See http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_Information?p...(accessed December 13, 2010.)

██████████ and the beneficiary had a *bona fide* marriage such as children, joint ownership of property, commingling of financial resources, affidavits from third parties, any photographs of their wedding or life together, or any other evidence that this marriage was *bona fide*.

Based on the interview with the New Jersey district office held on July 25, 2005, the I-130 petition was denied. Based on the multiple discrepancies cited by the director, he concluded that the marriage between ██████████ and the beneficiary was not a *bona fide* relationship and entered into *solely* for the purpose of obtaining immigration benefits for the beneficiary and not for any other reason. (Emphasis added.) Although asserted by counsel on appeal that this is insufficient to invoke the marriage fraud bar set forth in section 204(c), we do not agree because we find that a marriage entered into solely to procure immigration benefits is a marriage entered into in order to evade immigration laws. It is noted that the district director relied upon twenty-one inconsistent responses from the petitioner and beneficiary at the July 25, 2005 interview. In denying the petition, the district director had noted that the parties had been given a list of these discrepancies to provide an explanation for the discrepancies in testimony. The district director found that the petitioner and beneficiary failed to give any reasonable explanation for the discrepancies. Included among the twenty-one discrepant answers from the beneficiary and ██████████ that are set forth in the district director's denial, we note the following:

- 1) When asked about [the petitioner's] previous address ██████████, the [petitioner] said, "My cousin lives there." [The beneficiary] said, "My wife lives there with her daughter. ██████████"

Written explanation offered by the petitioner and beneficiary in the form of affidavits in support of the appeal filed with the Board of Immigration Appeals (BIA)⁷ is that the petitioner stated that her cousin currently lives at that address but she and her daughter formerly resided there. The beneficiary's explanation is that he did not understand the question correctly because of his poor English skills and failed to understand the question.

- 5) When asked about if [the petitioner] had cake while celebrating [the beneficiary's] birthday last year (9/9/04), [the petitioner] said, "I baked him cake at home and we had cake." [The beneficiary] said, "There was no cake."

BIA written explanation from the petitioner is that she did prepare a cake, but her husband may have forgotten. The beneficiary states that the immigration officer made him very nervous and his English was not good so he "messed up the birthday of 2004 with the birthday of 2003 regarding whether there was a cake." We note that in 2003, the beneficiary was still married to ██████████

- 7) When asked about how [the petitioner] and [the beneficiary] celebrated New Year's Eve

⁷ The appeal was dismissed on November 11, 2005.

last year (12/31/2004), [the petitioner] said, "We stayed home and watched the ball drop on TV. There were just the 2 of us at home that night." [The beneficiary] said, "We were at her grandma's house, and there was about 6-7 people there. At about 12:30 AM, we left and started driving to go home."

The petitioner's written explanation in support of BIA appeal is that they celebrated New Year's at home but went to her grandmother's home last Christmas. She states that her husband misunderstood the question. The beneficiary attributes his answer to his poor English, nervousness, and a cultural confusion in that he claims that the Chinese celebrate New Year's and Christmas together.

10) When asked about what [the petitioner] and [the beneficiary] had for dinner this Saturday (7/23/05), [the petitioner] said, "We ordered take-out from a Chinese restaurant, and the food was delivered at home. My husband opened the door for the delivery man and also paid the bill." [The beneficiary] said, "We ate dinner at home, my wife cooked pork and shrimp at home."

The petitioner now states in the written explanation offered in support of the appeal that they did order Chinese take-out and she additionally cooked pork and shrimp. The beneficiary's answer was that he was slow in understanding English, the immigration officer had a peremptory manner and the beneficiary confused this weekend with last weekend.

11) When asked what [the petitioner] and [the beneficiary] ate for dinner last evening (7/24/05), [the petitioner] said, "Me and my husband ordered take-out again from the same Chinese restaurant. He opened the door for the delivery man and paid the bill." [The beneficiary] said, "We ordered Chinese food, my wife opened the door for the delivery man and paid the bill."

In her BIA explanation, the petitioner states that her husband paid the bill and she doesn't know why he said that she paid for the dinner. The beneficiary states that his explanation is the same as for his answer to Number 10; he was nervous and he confused last weekend with this weekend.

16) When asked about what [the beneficiary] wore to bed last night, [the petitioner] said, "Grey boxers." [The beneficiary] said, "Nothing."

The petitioner's written explanation is that she saw her husband in grey boxers, but he may have taken them off later. The beneficiary's written explanation is that the Immigration Officer failed to clarify whether it was before or after going to bed and that he changes "into nightgown after I go

back from work because he feels comfortable that way. But when I go to bed, I will undress myself and wear nothing.”

21) When asked about [the petitioner’s] daughter, [redacted] address, [the petitioner] said “She lives with my grandmother at [redacted]” [The beneficiary] said, “She lives at [redacted].”

The petitioner’s written explanation offered in support of the appeal to the BIA is that “sometimes my daughter stays with my mother at that address.” The beneficiary’s written explanation in support of the appeal is that he was correct in the residence of his wife’s daughter (with the wife’s mother), but that his wife visited her daughter at her grandmother’s home because [redacted] [redacted] was not on good terms with her mother.

It is noted that counsel suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary in order to evade the immigration laws. Following a review of the district director’s denial including the twenty-one responses cited by her to be inconsistent, along with the ones noted above, and the written explanations offered in support of the BIA appeal, we find that explanations offered in support of such responses to be insufficient and disingenuous. It is noted that there is no evidence that the beneficiary was denied the use of an interpreter and his poor English skills failed to explain why neither party could agree what the beneficiary wore to bed the previous night, where the wife’s daughter lives (or wife and daughter), who paid for the Chinese food, how New Year’s was celebrated, or whether the beneficiary had a cake on his birthday. These are a few of the discrepant responses offered by [redacted] and the beneficiary at the district office interview. The AAO finds that a couple in a *bona fide* marriage would be expected to know such information.

We find that the evidence in the record indicating that the marriage was not *bona fide* and entered in order to attempt to evade immigration law was supported by substantial and probative evidence.

Therefore, an independent review of the documentation reflects substantial evidence that the beneficiary attempted to evade the immigration laws by marrying [redacted] and that attempt is documented in the alien’s file. Thus, the director’s determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.